

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL RAY EVANS,)	CASE NO. C05-1770-MJP
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION
)	
SANDRA CARTER,)	
)	
Respondent.)	
_____)	

INTRODUCTION

Petitioner is a state prisoner who has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent has filed a motion to dismiss, arguing that the petition is untimely and raising other procedural bars to the Court's consideration of the petition. In addition, in response to the Court's request for further briefing, the parties have addressed whether the petition is successive and must be dismissed or transferred to the Ninth Circuit. Based upon a review of the parties' submissions, the Court concludes, for the reasons set forth below, that the petition is successive and should be transferred to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and Circuit Rule 22-3(a).

jurisdiction to consider it, the Court directed petitioner to show cause why the petition should not be transferred to the Ninth Circuit as a successive petition. (Doc. #12) Petitioner filed a response to the Order to Show Cause (Doc. #14) and respondent has filed a reply (Doc. #16). This matter is now ready for review.

DISCUSSION

In his § 2254 motion, petitioner raises three grounds for relief. (Doc. #1 at 5-7). In essence, petitioner challenges various actions taken by the ISRB in extending his sentence. The precise dates of these actions are unclear, but it is clear that the ISRB's power over petitioner ended when his maximum 20-year sentence expired in December, 1994. (Doc. #10, Ex. 23). Therefore, the actions of the ISRB that petitioner complains of had to take place by 1994, at the latest.

Respondent argues that the Court need not address the merits of the petition because it is barred on several procedural grounds. (Doc. #10). In addition, respondent argues that the petition is successive and should be dismissed or transferred to the Ninth Circuit. (Doc. #16). As explained below, the Court agrees that the petition is successive and consequently, the Court need not address either the merits of the petition nor the alternative procedural grounds raised by respondent in her motion to dismiss.

Whether the Current Petition is Successive

By statute, this court is without jurisdiction to consider a second or successive habeas petition until the Ninth Circuit Court of Appeals has authorized its filing. *See* 28 U.S.C. § 2244(b)(3)(A); Circuit Rule 22-3. Title 28 U.S.C. § 2244(b)(3)(A) provides that *before* a second or successive habeas petition is filed in the district court, "the applicant shall move in the

01 appropriate court of appeals for an order authorizing the district court to consider the application.”
02 Section 2244(b)(3)(A) thus creates a “gatekeeping” mechanism at the appellate court for the
03 consideration of second or successive applications in the district courts. *See Felker v. Turpin*, 518
04 U.S. 651, 657 (1996). Specifically, it “transfers from the district court to the court of appeals a
05 screening function which would previously have been performed by the district court” *Id.* at
06 664. Permission may be obtained only by filing, with the appropriate appellate court, a motion for
07 authorization to file a successive habeas petition with the district court. The court of appeals may
08 authorize the filing of a second or successive application for habeas relief only if it determines the
09 application makes a prima facie showing that the application satisfies the requirements set forth
10 in 28 U.S.C. § 2244(b)(2).

11 Thus, the question here boils down to whether the current petition is a successive petition.
12 “Generally, a new petition is ‘second or successive’ if it raises claims that *were or could have been*
13 *adjudicated* on their merits in an earlier petition.” *Cooper v. Calderon*, 274 F.3d 1270, 1273 (9th
14 Cir. 2001)(emphasis added). Respondent apparently concedes that the claims raised here have not
15 previously been adjudicated. (Doc. #16 at 5). However, respondent argues, and the Court agrees,
16 that the claims *could* have been adjudicated earlier. As mentioned, petitioner’s claims arose by
17 the end of 1994, at the latest, when the ISRB’s jurisdiction over petitioner ended. Petitioner offers
18 no reason why he could not have challenged actions by the ISRB when he brought either of his
19 earlier two habeas petitions in 1997, particularly the second petition, which challenged actions
20 taken by the ISRB. (Doc. #18, Ex. 7 at 3). Accordingly, the current petition should be considered
21 successive.

22 In his response to the Court’s Order to Show Cause, petitioner addresses only one of his

01 two prior habeas petitions, *Evans v. DuCharme*, Case No. C97-5483-FDB. He argues that the
02 district court's dismissal of that petition was "without prejudice" and therefore, does not bar the
03 filing of a subsequent petition. *See, e.g., Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45
04 (1998). However, contrary to petitioner's assertion, the dismissal in his prior case was *with*
05 prejudice. (Doc. #18, Ex. 8). Accordingly, petitioner does not show that the instant petition is not
06 successive and should not be transferred to the Ninth Circuit.

07 CONCLUSION

08 For the foregoing reasons, petitioner's petition under 28 U.S.C. § 2254 should be
09 considered successive and transferred to the Ninth Circuit pursuant to 28 U.S.C. § 1631 and
10 Circuit Rule 22-3(a).¹ A proposed Order is attached.

11 DATED this 2nd day of June, 2006.

12 
13 Mary Alice Theiler
14 United States Magistrate Judge
15
16
17
18
19

20 ¹ Although respondent argues that the instant petition should be dismissed instead of
21 transferred to the Ninth Circuit, dismissal of a successive petition is reserved, by statute, for
22 situations where the successive petition presents a claim that the was previously presented. *See*
28 U.S.C. § 2244(b)(1). Here, as noted, respondent appears to concede that the instant claims
were not presented in a previous petition.